Nos. 424 and 425

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1945

No. 424

KENNECOTT COPPER CORPORATION, A CORPORATION, *Petitioner,*

vs.

STATE TAX COMMISSION; AND J. LAMBERT GIBSON, ROSCOE E. HAMMOND, MILTON TWITCHELL, AND HEBER BENNION, JR., CONSTITUTING SAID STATE TAX COMMISSION, *Respondents.*

No. 425

SILVER KING COALITION MINES COMPANY, A CORPORATION, *Petitioner,*

vs.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF PETITIONERS KENNECOTT COPPER CORPORATION AND SILVER KING COALITION MINES COMPANY

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BRIEF OF PETITIONERS KENNECOTT COPPER CORPORATION AND SILVER KING COALITION MINES COMPANY

Opinions Below

The opinion of the Circuit Court of Appeals for the Tenth Circuit and the dissenting opinion of Judge Orie L. Phillips (R. 141-151) are reported in 150 F. (2d) 905. The opinion of the United States District Court for the District of Utah, Central Division (R-33-36), delivered orally, is reported in 60 F. Supp. 181.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered July 23, 1945. (R. 151-152) The petitions for writs

of certiorari were filed and the cases were docketed September 12, 1945. Writs of certiorari were granted November 5, 1945. (R. 152-153) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1945.

Questions Presented

The questions presented are:

(1) Whether §§ 80-5-76 and 80-11-11, Utah Code Annotated 1943, authorizing the taxpayer to sue the State "in any court of competent jurisdiction" to recover an occupation tax paid under protest, waive the immunity of the State to suit in a Federal court.

(2) Whether a taxpayer who sues the State Tax Commission of Utah and the individuals comprising the Commission for the amount of an unlawful and wholly unauthorized tax paid under protest, thereby sues the State of Utah exclusively and deprives the Federal court of jurisdiction over any of the defendants, unless the State shall have waived its immunity to suit in a Federal court.

Statement

These are suits by petitioners to recover occupation taxes paid under protest to the State Tax Commission of Utah. The validity of the tax is not now in issue, since the Circuit Court of Appeals by a majority opinion concluded that the Federal courts lacked jurisdiction to entertain the suits (R. 141-147), and on that ground alone reversed the judgments of the District Court in favor of petitioners. (R. 26, 137) The issue here is solely that of jurisdiction, but a brief statement of the nature of the case is necessary to a clear understanding of the issue.

Commencing with the year 1937, the State of Utah imposed on all persons engaged in the business of mining "an occupation tax equal to one per cent of the gross amount received for, or the gross value of, metalliferous ore sold" during the preceding calendar year. § 80-5-66, Utah Code Annotated 1943. The State Tax Commission was empowered to administer the Act.

During 1943 the United States paid to petitioners and other mining companies subsidies to stimulate their production of metals critically essential to the prosecution of the war. (R. 38, 78) In fixing the amount of the occupation tax for 1944, respondents included as a part of the "gross amount received for, or the gross value of, metalliferous ore sold" the amount of these federal subsidies. Petitioner Kennecott Copper Corporation, a citizen of New York, and petitioner Silver King Coalition Mines Company, a citizen of Nevada, paid to the respondent State Tax Commission under protest $37,814.22 and $4533.54 respectively, representing the occupation tax upon the federal subsidies. (R. 10, 15, 77, 78, 124, 129) Petitioners thereupon instituted these suits against the State Tax Commission and the individuals constituting the Commission in the United States District Court for the District of Utah, seeking judgments against the Commission and the individual defendants for the amount of the alleged unlawful collections. (R. 1, 116)

Two bases for jurisdiction are alleged (R. 1-3; 116-118): (1) diversity of citizenship, inasmuch as the State Tax Commission and the individual members of the Commission are all citizens of Utah and petitioners are citizens of other states; (R. 1-3; 116-118) and (2) the existence of a federal question—more specifically, that this was a direct levy upon

the means employed by the National Government to wage war, constituted an unlawful interference with the exercise of the federal war power, and deprived petitioners of their property without due process of law, contrary to the Fourteenth Amendment. (R. 9-10; 123-124)

After a trial on stipulated facts (R. 38-85) judgments were rendered by the District Court against all of the respondents as prayed. (R. 26, 137) The Circuit Court of Appeals reversed and remanded with directions to dismiss on the ground that the suits were against the State solely and that the State had consented to be sued only in the State courts. Judge Phillips dissented, finding a comprehensive waiver of immunity by the State of Utah, which included authority to sue the State in both state and federal courts.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Tenth Circuit erred:

1. In holding that the State of Utah had not waived its immunity to suit in a Federal court, to recover an occupation tax paid under protest.

2. In holding that, by suit against the State Tax Commission and against the individual members of the State Tax Commission, for the amount of an occupation tax paid under protest and alleged to be unlawful and unauthorized, petitioners had sued the State of Utah exclusively and had deprived the Federal court of jurisdiction over any of the defendants.

Summary of Argument

By the provisions of the statutes of Utah, the State has consented to be sued in the Federal courts for recovery of

an occupation tax paid under protest, has waived its immunity to suit in both state and federal courts in all actions for recovery of taxes paid under protest. It is not the rule that a statute granting permission to sue the State must be construed to apply to the state courts only unless there be an explicit reference to the federal courts. A statute granting permission to sue the State "in any court of competent jurisdiction," without limitation or qualification either implicit or expressed, embraces within that language state and federal courts indiscriminately where the facts otherwise requisite to federal jurisdiction are present. The actions arise under the Constitution and laws of the United States.

The State Tax Commission is a creature of the Constitution of Utah. It is endowed with the power to sue and be sued in its own name, a power that is unqualified and unlimited. It is an entity separate and distinct from the State, is accordingly capable of acquiring and has acquired citizenship in the State of Utah, and diversity of citizenship as a basis for federal jurisdiction exists as to it.

The individuals comprising the State Tax Commission are here sued in their individual capacities, as citizens of the State of Utah, and diversity of citizenship as a basis for federal jurisdiction exists as to them. Suits maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs under color of authority that in fact had not been conferred, are not suits against the State. The effect of the decision below is, contrary to Utah law, to remove individual liability for unlawful exactions of taxes.

Statutes Involved

Section 80-5-6, Utah Code Ann. 1943, whereby an occupa-

tion tax is imposed on every person engaged in the business of mining or producing valuable metalliferous ore "equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold," an excise, levied upon the gross amount received from sales of ore or metals.

Section 80-5-81, Utah Code Ann. 1943, whereby it is provided that all such taxes shall be paid to the State Tax Commission.

Section 80-5-76, Utah Code Ann. 1943, whereby it is provided that "any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by § 80-11-11, Revised Statutes of Utah, 1933."

Section 80-11-11, supra, whereby it is provided that where a party, whose property is taxed, or from whom a tax is demanded or enforced, deems such tax unlawful, he may pay the same under protest to the officers designated and authorized by law to collect the same, and thereupon "may bring an action in any court of competent jurisdiction against the officers to whom said tax . . . was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax"

Section 80-11-13, Utah Code Annotated 1943, whereby it is provided that taxes paid to the State under protest should not be covered into the general fund but should be held and retained by the State Treasurer and not be expended until it shall have been finally determined that such tax had been lawfully or unlawfully collected.

The pertinent portions of the several statutes referred to are set forth in the appendix, infra, pages I and II.

There is nothing in the Utah statutes indicating an intention on the part of the legislature that the phrase "any court of competent jurisdiction" should not embrace the Federal courts.

The Emergency Price Control Act of 1942, approved January 30, 1942 (56 Stat. 23, as amended October 2, 1942; 56 Stat. 767; 50 U. S. C. Appendix) 901, 902(e), the purpose of which among others was to secure the maximum necessary production of any commodity essential to the prosecution of the war and for that purpose to make subsidy payments to domestic producers in such amounts as might be determined to be necessary to obtain maximum necessary production.

Executive Order No. 9250, Title V, as amended by Executive Order No. 9281 (50 U. S. C. Appendix, § 901, p. 316) pursuant to authority conferred by the Emergency Price Control Act of 1942 by which order Metals Reserve Company was authorized to subsidize, if such measure were necessary to insure the maximum production of any commodity necessary to the successful prosecution of the war.

The Second War Powers Act, being the Act of June 28, 1940 (54 Stat. 676), as amended March 27, 1942, ch. 199, Title III, § 201 (56 Stat. 177, 50 U. S. C. Appendix § 633, p. 258) whereby the President of the United States was authorized to allocate all production in such manner as he should deem necessary or appropriate in the public interest and to promote the national defense.

Executive Order No. 8734, April 11, 1941, as amended by Executive Order No. 8875, August 28, 1941 (Vol. 9 U. S. C. Cong. Serv. 1941, pp. 852, 867), whereby the Office of Price Administration was created and the administrator's duties

were defined, among which duties was that of prescribing maximum prices and all elements of cost or price of materials or commodities and enforcing their observance; and pursuant to authority thus conferred upon it, the Office of Price Administration on August 12, 1941, established a ceiling price for copper of 12c per pound (Price Schedule No. 15, 6 Fed. Reg. 4008). And on January 13, 1942, the Administrator issued Price Schedule No. 69 (7 Fed. Reg. 284) which fixed the maximum price for primary lead at 6½c per pound. And on January 28, 1942, the Administrator issued Price Schedule No. 81 (7 Fed. Reg. 601) fixing the maximum price for primary slab zinc at 8¼c per pound.

Executive Order No. 9024 (Vol. 1, Cumulative Supplement, Code of Federal Register of U. S. A., p. 1070) issued January 16, 1942, whereby the President of the United States created the War Production Board, established a chairman, and among other things authorized and empowered him to exercise general direction over the war procurement and production program; and on February 9, 1942, in order to stimulate increased production for the war effort, the War Production Board and Office of Price Administration issued a joint statement (R. 95-97) providing for subsidies supplementary to the ceiling prices for these metals to be paid by Metals Reserve Company for production in excess of quotas fixed for the various producers. Metals Reserve Company neither agreed to nor did it purchase any ore (R. 69) but pursuant to the order has paid subsidies for production in excess of quotas of 5c per pound for copper, 2¾c per pound for zinc, and 2¾c per pound for lead.

Atricle I, Sec. 8 of the Constitution of the United States, empowering Congress to declare war and prosecute the same;

and Article I, Sec. 10 of the Constitution of the United States denying that power to the states.

Fourteenth Amendment to the Constitution of the United States, wherein it is provided that no state shall deprive any person of property without due process of law.

ARGUMENT

I.

Point

The Utah statutes, authorizing suit "in any court of competent jurisdiction" to recover an occupation tax paid under protest, constitute a waiver by the State of Utah of its immunity to suit in a Federal court.

Secion 80-11-11, Utah Code Annotated 1943, Appendix p. II, authorizes a taxpayer to maintain a suit "in any court of competent jurisdiction against the officer" to whom said tax * * * was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected." Section 80-5-76, Appendix p. I, reaffirms that authority with respect to the occupation tax. The majority of the court below has now decided, however, that the words "any court of competent jurisdiction" must be read as if they were "any *State* court of competent jurisdiction." We submit that the decision is wrong, for a number of reasons.

1. Section 80-11-11 is a statutory provision of long standing. It was enacted in the first few months of Utah's statehood (Laws, 1896, Ch. CXXIX, Sec. 180, p. 466) and has been carried into the various revisions and compilations of Utah statutes since that time. Revised Statutes of Utah,

1898, Sec. 2684; Compiled Laws of Utah, 1907, Sec. 2684; Compiled Laws of Utah, 1917, Sec. 6094.

The section has been amended but once, in 1933 (Rev. Stat. of Utah 1933, § 80-11-11). Prior to that time, a taxpayer was authorized to bring suit "in any court of competent jurisdiction" against "the officer to whom said tax * * * was paid or against the county or municipality on whose behalf the same was collected." In 1933, without any limitation on the phrase "in any court of competent jurisdiction," the latter portion was amended to read (new provisions are in italics):

> * * * against the officer to whom said tax * * * was paid ,or against the *state*, county, municipality *or other taxing unit* on whose behalf the same was collected.

The significance of the addition of the word "state" in 1933 lies in the fact that long prior thereto the section—and particularly the phrase "in any court of competent jurisdiction"—had acquired a well-defined meaning as including Federal courts. Suits had been brought and successfully maintained in the Federal courts pursuant to the permission contained in Section 80-11-11 on several occasions, with no objection on the part of either the State taxing officials or the Federal courts themselves—including this Court. *Bassett* v. *Utah Copper Co.*, 219 F. 811 (C. C. A. 8th, 1914) (Section 80-11-11 was then Section 2684); *South Utah Mines & Smelters* v. *Beaver County*, 262 U. S. 325 (1923) (Section 2684); *Salt Lake County* v. *Utah Copper Co.*, 294 Fed. 199 (C. C. A. 8th, 1923), certiorari denied, 264 U. S. 590, writ of error dismissed, 267 U. S. 610 (Section 80-11-11 was then Section 6094); *Beaver County* v. *South Utah Mines &*

Smelters, 17 F. (2d) 577 (C. C. A. 8th, 1927), certiorari denied, 274 U. S. 746 (Section 6094). Consequently, when the word "state" was added in 1933, it can scarcely be contended that the legislature was unaware of the undoubted fact that "any court of competent jurisdiction," in which it was consenting to be sued, included the Federal courts.

It is apparent, of course, that a suit against a county, such as those above cited, does not require a waiver of sovereign immunity.[1] Under the circumstances, however, to read significance into this fact is to argue that the addition of the word "state" in the amendment of 1933 constituted an implied amendment of the wholly distinct provision "any court of competent jurisdiction" so that it would read "any *State* court of competent jurisdiction." Plainly, had the legislature contemplated any such amendment, it would have made it, and it did not. A suit in a federal court as one of the courts of competent jurisdiction was not authorized for some taxing units and not others. If the language means "any *State* court of competent jurisdiction" it is equally applicable to suits against counties; if it means what it says —"*any* court of competent jurisdiction"—it is equally applicable to suits against the State. It is significant, therefore, that since 1933 the section has continued to receive the interpretation that "any" means "any," and includes the federal courts. *Salt Lake County* v. *Utah Copper Co.*, 93 F. (2d) 127, (C. C. A. 10th, 1937), certiorari denied, 303 U. S. 652.

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[1] These suits were instituted against the counties to whom the tax collecting function had been delegated. The State, however, shared in the proceeds of the tax, and its Attorney General or his deputies participated in the federal litigation.

2. The phrase "any court of competent jurisdiction" may be traced back to R. S. Sec. 2326, Act of May 10, 1872 (30 U.S.C. Sec. 30).[2] This early mining statute, with its reference to "a court of competent jurisdiction," had been a rule of thumb throughout the mining states of the West—Colorado, Utah, Nevada, California, and others. When Section 80-11-11 was first enacted in 1896, the Utah legislature merely substituted the word "any" for "a"—"any court of competent jurisdiction"—an even broader phrase than that contained in the Federal statute. But even at that time the Federal statute had been uniformly accepted, in Utah and elsewhere, as including both federal and state courts. This court stated, in 1884, in a suit arising out of the Territory of Utah, that the phrase "a court of competent jurisdiction" in R. S. Section 2326 meant "a court of general jurisdiction, whether it be a State court or a Federal court." *Chambers v. Harrington*, 111 U. S. 350, 351. See also *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683 (1895); *Perego v. Dodge*, 163 U. S. 160 (1896); *Burke v. M'Donald*, 2 Idaho (Hasb.) 339, 13 Pac. 351 (1886). That interpretation, of course, has been continued and is still authoritative. *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571; *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 506.

The following language of Mr. Justice Brewer in Shoshone Mining Co. v. Rutter, supra, 177 U. S. at 506, is appropriate here:

> When in § 2326, Rev. Stat., Congress authorized that which is familiarly known in the mining regions

[2] "* * * It shall be the duty of the adverse claimant, within thirty days after filing his claims, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession * * *"

> as an "adverse suit," it simply declared that the adverse claimant should commence proceedings "in a court of competent jurisdiction." It did not in express language prescribe either a Federal or a state court, and did not provide for exclusive or concurrent jurisdiction. If it had intended that the jurisdiction should be vested only in the Federal courts, it would undoubtedly have said so. If it had intended that any new rule of demarcation between the jurisdiction of the Federal and state courts should apply, it would likewise undoubtedly have said so. Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts. * * *

This uniform and well-known construction of the statutory prototype of Section 80-11-11 furnishes strong additional support for our belief that in enacting Section 80-11-11 in 1896 the Utah legislature intended "any court of competent jurisdiction" to include both Federal and state courts.

3. Furthermore, Section 80-5-76, Appendix p. 1, which was enacted in 1937 and which expressly makes Section 80-11-11 applicable to suits for refund of occupation taxes paid under protest, reiterates the State's purpose to authorize suits in federal courts. The section first provides that, on direct review of any decision of the Tax Commission "no court *of this state* except the supreme court shall have jurisdiction." But, in sharp contrast, with respect to refund of occupation taxes paid under protest, the section provides that such a taxpayer may "thereafter bring an action in *any* court of competent jurisdiction as provided by Section 80-11-11."

If the majority below purported to find in this section support for its view that suits to recover occupation taxes

paid under protest must be in state courts (R. 142, 145, 146), we submit that it flagrantly misconstrued the section. Section 80-5-76 indicates a policy of *direct* review of the Tax Commission in the Utah Supreme Court, but by the sharply contrasting language of the proviso whereby authority is explicitly reserved to bring suit to recover taxes paid under protest in "*any* court of competent jurisdiction," it even more clearly emphasizes the long-standing policy of enabling such suits to be brought in either state or federal courts. The exception would not have been stated merely to authorize suits in the State's inferior courts when the legislature had already provided for complete review in the State's Supreme Court.

4. It should not be overlooked that the construction which we urge is the normal, literal construction, and that the construction for which respondents argue requires the interpolation of a limiting adjective which was not added by the legislature. "Any" is a broad word—the broadest possible word—equivalent to, and with the force of, every, or each one of all. *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709, 713; *Roedler v. Vandalir Bus Lines, Inc.*, 281 Ill. App. 520, 523; *Heyler v. City of Watertown*, 16 S. D. 25, 91 N. W. 334; *People v. Van Cleave*, 187 Ill. 125, 58 N. E. 422, 425; *Bouvier Law Dictionary* (3d ed.) Vol. I, p. 208. The word "any" is all comprehensive and unless limited by the context, includes all persons and things referred to indiscriminately. *Orme v. Atlas Gas & Oil Co.*, ... Minn. ....., 13 N. W. 2d 757, 763; *Stout v. Simpson*, 34 Okla. 129, 124 P. 754, 756. In numerous statutes, the same phrase—"any court of competent jurisdiction"—where not limited by context, has been uniformly held to include both federal and state courts indis-

criminately, the facts otherwise essential to federal jurisdiction being present. Bankruptcy Act, Sec. 77(j), 11 U. S. C. Sec. 205(j); *In re Chicago & E. I. Ry. Co. Gourley v. Wham*, 121 F. (2d) 785 (C. C. A. 7th); Emergency Price Control Act of 1942, 50 U. S. C. App. Sec. 901, *et seq.*: *Regan v. Kroger Grocery & Baking Co.*, 386 Ill. 284, 54 N. E. (2d) 210; *Miller v. Municipal Court*, 22 Cal. (2d) 818, 142 P. (2d) 297; *Hall v. Chaltis*, 31 Atl. (2d) 699; Fair Labor Standards Act, 29 U. S. C. Sec. 201, *et seq.*: *Stringer v. Griffin Grocery Co.*, 149 S. W. (2d) 158; *Dennis v. Equitable Equipment Co.*, 7 So. (2d) 397 (La.); *Hargrave v. Mid-Continent Petroleum Corp.*, 36 F. Supp. 233; *Wingate v. General Auto Parts Co.*, 40 F. Supp. 364; *Booth v. Montgomery Ward & Co.*, 44 F. Supp. 451; *Donahue v. Susquehanna Collieries Co.*, 138 F. (2d) 3 (C. C. A. 3d); *Mengel v. Ishee*, 192 Miss. 366, 4 So. (2d) 878; Internal Revenue Act of July 13, 1866, Sec. 19: *The Collector v. Hubbard*, 12 Wall. 1, 14. See also *National Sash & Door Co., Inc., v. Continental Casualty Co.*, 37 F. (2d) 342 (C. C. A. 5th); *James Freeman Brown Co. v. Harris*, 139 F. 105 (C. C. A. 4th); *Robertson v. Railroad Labor Board*, 268 U. S. 619; *Finn v. Meighan*, ... U. S. ....., 89 L. ed., Vol. 15, Adv. Op. p 1086; and cases cited p. 12 supra.

5. Despite all of these considerations, the majority below apparently felt compelled to its result by the two recent decisions of this Court in *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, and *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459. We submit that, on the contrary, Judge Phillips was correct in pointing out in his dissent that the two cases were clearly distinguishable, and that the majority opinion completely misconstrued their purport. Under the majorty decision below, nothing but an express mention of the Federal courts

in the statute would suffice. That is clearly not the rule stemming from the facts in these two cases, nor is it the rule which prevails in the correlative situation involving the waiver of the immunity of the United States to suits in State courts. In *Minnesota v. United States*, 305 U. S. 382, 389-390, Mr. Justice Brandeis stated: "The United States argues that a statute granting permission to sue the United States must be construed to apply only to Federal courts unless there is an explicit reference to the state tribunals. * * * This is not universally true even as to suits against the United States * * *."

In both the *Great Northern Life Ins. Co.* and the *Ford Motor Co.* cases there were factors, not present here, which indicated an intention to restrict the limits of the State's waiver of immunity to its own courts. In the former case, the Oklahoma statute (Session Laws, 1915, Ch. 107) by Article 1, Subdivision B, Section 1, provides that appeals taken from all boards of equalization "shall have precedence in the court to which they are taken." Section 2 provides a proceeding before the county board of equalization upon a complaint in writing and evidence adduced upon issues so proved—

> * * * and the stenographer of the County Court is directed, at the request of the Board or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the actions of the Board thereon and file the same with his certificate as to his accuracy in the district court, the filing of which transcript shall complete said appeal which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand. * * *

Section 3 prescribes a similar proceeding before the State Board of Equalization. Section 4 provides that the appellate

court "shall presume in favor of said Board any facts, circumstances or information of general knowledge in the particular business whose property was assessed by it." Section 5 adds that "the remedies of resort to the Boards and appeal therefrom shall be the sole remedies for the correction of assessment or equalization." Such prescribed and exclusive procedures cannot be reconciled with the conduct of a suit in a Federal court. As this Court itself noted in the *Great Northern Life Ins. Co.* case (322 U. S. at page 55):

> Furthermore, § 12665 gives directions to the Oklahoma officer as to his obligations, requires the court to give precedence to these cases and directs the kind of a judgment to be returned * * * which is quite different in language, if not in effect, from the judgment a federal court would render.

Similar considerations prevail with respect to the *Ford Motor Co.* case. The Indiana statute there involved (Section 64-2614(a), Burns' Indiana Stat. Ann. (1943 Replacement) provided:

> * * * Any person improperly charged with any tax provided for under the terms of this act, and required to pay the same, may recover any amount thus improperly collected, together with interest, in any proper action or suit against the department in any court of competent jurisdiction; and the circuit or superior court of the county in which the taxpayer resides or is located shall have original jurisdiction of action to recover any amount improperly collected.

This Court itself stressed the importance of that language, in stating (323 U. S. at pp. 465-466):

> The provision in this section which vests original jurisdiction of suits for refund in the "circuit or superior court of the county in which the taxpayer resides or is located" indicates that the state legislature contemplated suits in the state courts.

6. Moreover, there are two considerations enunciated in these two recent cases which were overlooked by the majority below. In the *Great Northern Life Ins. Co.* case the court cited the following language from *Gunter v. Atlantic Coast Line*, 200 U. S. 273, dealing with a similar problem (see 322 U. S. at p. 47):

> If there were doubt * * * that doubt is entirely dispelled by a consideration of the contemporaneous interpretation given to the act by the officials charged with its execution, * * * and by the action as well as non-action which followed the decision of that case by the state government in all its departments through a long period of years.

And the Court added (*ibid.*):

> The administrative construction by a state of these statutes of consent have influence in determining our conclusions.

Here, as we have already pointed out in part 1 of this Point, there has been a very long-standing and well-recognized judicial and administrative construction of Section 80-11-11, directly contrary to the construction which it was accorded by the majority below.

The other factor which the majority below ignored is the contrast between the general policy of the State of Indiana and of the State of Utah. In Indiana, as the Court pointed out in the *Ford Motor Co.* case, the policy was against Federal court litigation (323 U. S. at p. 466):

> Moreover, this interpretation of § 64-2614(a) to authorize suits only in state courts accords with the state legislature's policy. Indiana has adopted a liberal policy toward general contract claimants but confines their suits against the state to state courts.

In Utah, the legislative policy is quite the contrary. As recently as 1939, the State enacted Section 104-3-27, by

which it consented to be sued "in any court of this state or of the United States"—

> • • • for the recovery of any property real or personal or for the possession thereof or to quiet title threats, or to foreclose mortgages or other liens thereon or to determine any adverse claim thereof, or secure an adjudication touching any mortgage or other lien the State of Utah may have or claim on the property involved.

In summary, as Judge Phillips stated in his dissent (R. 151):

> In the instant case, neither the context of the statute nor the public policy of the state of Utah indicates that the phrase "in any court of competent jurisdiction" should be restricted to state courts.

We respectfully submit, therefore, that the decision of the court below should be reversed on this ground alone.

II

Point

Respondent State Tax Commission is a distinct entity separate and apart from the State of Utah, is a citizen of Utah, and diversity of citizenship exists.

Respondent State Tax Commission is an entity created by the Constitution of Utah to administer and supervise the tax laws of the state. (Art. XIII, Sec. 11, Constitution of Utah.) It is endowed with power to sue and be sued in its own name, this without qualification or limitation (Utah Code Ann. 1943, §80-5-46), is endowed with power to employ such agents, attorneys and others as may be necessary to perform the Commission's duties (§80-5-41), and they hold office during the pleasure of the Commission (§80-5-42). The Commission is empowered to prescribe rules and regulations for its own government and the transaction of its business

(§80-5-46), to establish throughout the state such branch offices as it may deem necessary (§80-5-43), and to have and use an official seal, filing an impression and description thereof with the Secretary of State. It is a completely autonomous body. The legislature may implement, but may not detract from its constitutional powers. Within the realm of its constituted authority, the State Tax Commission is supreme. The Commission possesses every corporate power that in the nature of things it will ever have occasion to exercise.

The State Tax Commission was the collecting officer within the provisions of §80-11-11 and is sued as a distinct entity separate and apart from the State of Utah and as a citizen of the State of Utah. The remaining defendants are the individuals who constitute the State Tax Commission and they are sued as citizens of the State of Utah. It is so alleged in the complaints. (R. 2-3, 117-118) The cause of action pleaded lies against the State Tax Commission and the individuals constituting it, and it is alleged that they and all of them made the levy complained of and in so doing acted beyond their power or authority. Judgment is prayed "against the defendant State Tax Commission and the other defendants" (R. 9-10, 123-124), and judgments were so rendered. (R. 26, 137) It is the position of petitioners that these suits against the State Tax Commission and the individuals comprising it for the amount of this unlawful and unauthorized tax paid under protest, are not suits against the State of Utah and that the federal court has jurisdiction on the basis of diversity alone.

Petitioners would seem to be squarely within the rule laid down by this court in *Thomas v. Ohio State University*

Trustees, 195 U. S. 207, 49 L. Ed. 160. That suit was one to partition certain lands alleged to be held adversely by the Board of Trustees. Jurisdiction was wholly dependent upon diversity of citizenship. The Board of Trustees of the Ohio State University was defined by the pleadings as "created as a collective body by the laws of that state, with power to sue and be sued by the name of the Board of Trustees of the Ohio State University." The Supreme Court of Ohio had adjudged the Board to be "an agency to manage and control a state institution as the State may direct or provide." The case came to this court on a certificate from the Circuit Court of Appeals for the Sixth Circuit, presenting certain questions, among which was the following:

> "If the said Board of Trustees be not * * * a corporation * * *, may this suit be maintained against it as 'the Board of Trustees of the Ohio State University' without bringing the persons constituting the Board before the court as defendants?"

This court answered the question as follows, Mr. Justice Harlan writing the opinion:

> * * * as the board was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the circuit court would have sufficiently appeared, so far as the pleadings were concerned, without bringing the several persons constituting the board before the court as defendants, provided the bill had contained the additional allegation that each individual trustee was a citizen of Ohio. * * *

Pennoyer, et al., v. McConnaughy, 140 U. S. 1, 35 L. ed. 362:

This was a suit instituted against the defendants, who comprised the Board of Land Commissioners of the State

of Oregon. It was contended that the suit was one against the State of Oregon forbidden by the Eleventh Amendment. This court held that the suit was of the class—

> * * * where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. * * *

and continued:

> * * * Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State. * * *

The court commented that the suit was against those individuals who collectively constituted the Board of Land Commissioners. The suits at bar are likewise against those individuals who collectively constitute the State Tax Commission, and they are sued not only individually but in their collective name, the State Tax Commission, which is empowered by statute to sue and be sued in that name in any court of competent jurisdiction in actions of the class to which these at bar belong. And it is here charged that these individuals, both as individuals and in their collective name, the State Tax Commission, have acted in excess of their authority and that their act is therefore not that of the State.

The classical statement of the law upon this subject in Poindexter v. Greenhow, 114 U. S. 270, at 288, will bear repetition here as follows:

> The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant, in the present case, undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defense.

The court below recognized that principle in United States v. Board of Commissioners of Grady County, Oklahoma, et al., 54 F. (2d) 593.

Moreover, §80-11-11 authorizes suit for the recovery of taxes paid under protest "against the officer to whom said tax * * * was paid, *or* against the state, county, municipality, or other taxing unit on whose behalf the same was collected." The suits at bar were instituted against the officer to whom the taxes were paid, not against the state, county or other taxing unit, on whose behalf the same were collected. The State Tax Commission was the officer to whom the tax was paid. The statute itself makes the distinction between the officer receiving payment of the tax and the state or other taxing unit on whose behalf the collection was made, and which might have been sued instead of the State Tax Commission had these petitioners so elected. Within the contemplation of the statute itself, the officer making the collection is an entity separate and apart from the state or other unit for which the collection was made. The officer here involved, the State Tax Commission, was by statute endowed with power to sue and be sued in its own name in any court of competent jurisdiction. Suit can be maintained only by legal entities, persons, corporations or quasi corporations. Upon this subject attention is directed to the following:

Parks, et al., v. Carriere Consol. School Dist. (C.C.A. 5th), 12 F. (2d) 37, as follows:

> If a school district is authorized by the legislation creating it, as construed by the courts, to contract and sue in its own name, then it is a body corporate, or a quasi corporate body, and as such a citizen of the state under which it is organized, within the purview of the Removal Act. This is true, though it may also be protected from suit by statute or court decision. A mere bureau or department of a state government cannot sue in its own name, or be a plaintiff. Conferring on a school district capacity to contract and

sue in its own name, of itself, makes of it more than a mere governmental bureau. The authority to institute suits in its own name subjects it to the burdens of a suitor, including those arising under the Removal Act. Suits can be maintained only by legal entities—persons, corporations, or quasi corporations. The legislation that is sufficient to empower a school district to sue in its own name makes of it a legal entity, and a citizen within the meaning of the Removal Act. In this case the state of Mississippi is not a party plaintiff on the record.

State of Missouri v. Homesteaders Life Assn., No. 10850, (C.C.A. 8th, May 27, 1937—Rehearing Denied June 21, 1937, Cert. Denied, 302 U. S. 717), 90 F. 2d 543, as follows:

In State Highway Commission v. Kansas City Bridge Company, 81 F. (2d) 689, we point out the distinction between the case of Louisiana Highway Commission v. Farnsworth, supra, and State Highway Commission v. Utah Construction Co., supra. In the Utah Construction Company Case, the State Highway Commission was not authorized to sue nor be sued. So, in State Highway Commission v. Kansas City Bridge Company, supra, the State Highway Commission could not sue nor be sued. In commenting upon the distinction between these cases we said: "We think that the true distinction between the case of Louisiana Highway Commission v. Farnsworth, supra, and State Highway Commission of Wyoming v. Utah Construction Co., supra, is that in the former the federal court had jurisdiction not because the state Supreme Court had held that the commission was a legal entity distinct from the state and subject to suit, but because, under the constitution and laws of Louisiana, it was such a legal entity and a citizen of Louisiana—while in the latter case the highway commission of Wyoming was a mere representative of the state."

Under the Missouri laws, the Superintendent of the Insurance Department is, we think, an entity distinct from the state with power to sue and be sued. The state in the instant action has not made itself "an

active agent," and has not "assumed responsibilities." * * *

> The state has divorced itself from the litigation which the Superintendent of the Insurance Department may conduct. Its position is comparable to that of the beneficiary of an express trust whose citizenship has no bearing on the jurisdiction of a federal court, the court not looking beyond the citizenship of the trustee who is the party litigant. * * * The mere fact that the state has a beneficial interest in the ultimate recovery does not make it a party. * * *

Bromwell Brush & Wire Goods Co. v. State Board of Charities and Corrections (District Court, E. D. Kentucky, September 24, 1921, Affirmed 288 F. 1018; Cert. denied, 262 U. S. 753), 279 F. 440:

> * * * In neither act is it provided in so many words that the board thereby created is to be a corporation. Notwithstanding such is the case, the former board was, and the defendant board is, a corporation, or at least a quasi corporation. * * *
>
> * * * the State Board of Control, as long as it was in existence, had, and the defendant board, since its creation, has the power to sue and to be sued. Such is an inseparable incident of being a corporate entity. * * *
>
> * * * *
>
> * * * a suit against a state officer or a state agency, in which relief is sought solely against the officer or agency, and a good cause of action against him or it is stated, is always maintainable, no matter how much the state will be affected by the granting of such relief. Such a suit is not a suit against the state.

Hunkin-Conkey Construction Co. v. Pennsylvania T. Commission (D. C. M. D. Pa.), 34 F. Supp. 26:

The sole basis of jurisdiction was diversity of citizenship. It was contended that the Commission was but the agent of the State and that the State was the real party defendant and therefore the suit was barred by the Eleventh Amendment; that if not so barred, the court was without jurisdiction because diversity did not exist. The court held:

> * * * In this case, the Commission is authorized to sue and be sued. This general provision constitutes a waiver by the State, if the State is the real party in interest, of its immunity from suit. * * * However, as shall be shown later, it is my conclusion that the State is not the real party defendant.
>
> * * * *
>
> The fact that the Commission is not a corporation does not make it any less a distinct legal entity. It is an unincorporated association, sometimes called a quasi corporation, with power to sue and be sued in its own name, and as such it assumes the citizenship of its members. Thomas v. Board of Trustees, 195 U. S. 207, 25 S. Ct. 24, 49 L. Ed. 160. In the present case, the members of the Commission are alleged to be citizens of the Commonwealth of Pennsylvania and, therefore, this Commission must be deemed to be a citizen of Pennsylvania within the meaning of 28 U.S.C.A. §41 (1).
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> * * * *

Louisiana Highway Commission v. Farnsworth, 74 F. (2d) 910; certiorari denied, 294 U. S. 729, 79 L. Ed. 1259, 55 S. Ct. 638.

The Fifth Circuit deemed itself bound by the decision of the Supreme Court of Louisiana in Saint v. Allen, 172 La. 350, 134 So. 246, from the opinion in which case the court quoted in part as follows:

> "The commission, in our opinion, is a distinct legal entity from the state. Section 3 of Act. No. 95

> of 1921 (Ex. Sess.) makes it a body corporate, with power as such to sue and be sued. It is an agency of the state, and not the state itself, created for the purpose of executing certain duties, devolving primarily upon the state. * * *
>
> * * * it may be said that the ruling, as to the separate existence of the commission, is not well taken here, because the act, creating it, provides that all contracts for highway improvement shall be made in the name of the state, and that the state, acting through the commission, may acquire gravel beds, and the like, by purchase, lease, or donation, and that the state provides the commission with funds with which to discharge the purposes of its creation. Sections 16, 23, 34, Act. No. 95 of 1921 (Ex. Sess.). These facts, however, are insufficient to make the commission and the state one and the same. They merely show that the commission is an agency of the state. It does not even follow that, because contracts for highway improvements must be entered into in the name of the state, suits on such contracts should be brought by the state or against it, for the commission, as a body corporate, is given express power to sue and be sued, which shows that such suits should be instituted by the commission, and not by the state.

State Life Insurance Co. v. Daniel (D. C. W. D. Texas), 6 F. Supp. 1015:

> The defendant Daniel was Commissioner of Insurance of the State of Texas. He was sued to recover an occupation tax paid under protest, the amount of which was being held in a "suspense account" provided for by the laws of Texas, awaiting determination of the title thereto as provided by the suspense statute. It was contended that the suit was one against the State of Texas and that there was no diversity. The statute provided for suit in any court of competent jurisdiction in Travis County, Texas, the statute making no provi-

sion as to whether the court should be state or federal. The court overruled the plea to the jurisdiction, saying in part:

> In arriving at this conclusion the court has not overlooked the case of Smith v. Reeves, 178 U. S. 436, 20 S. Ct. 919, 920, 44 L. Ed. 1140, much relied on by defendants. That case, while similar in its subject-matter to the one at bar, is easily distinguished. There a California suspense statute was under consideration, and there the money exacted was at once paid into the state treasury and treated as the property of the state. It was mingled with other moneys owned by the state and claimed by the state, and the court, in passing upon the matter, held that despite the fact that the action was against a state official, the state was in truth and in fact the party at interest. However, in determining this point, the court makes this very significant statement:
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> "This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the state and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the state of which he is an officer or agent. Tindal v. Wesley, 167 U. S. 204, 221, 17 S. Ct. 770, 42 L. Ed. 137, 143, and authorities there cited. * * *
>
> This statement by the court applies peculiarly to the Texas statute. Sections 3 and 4 of article 7057b evidence clearly the legislative intention that money paid by the taxpayer under protest shall be segregated and held as a fund apart until the title to it is determined. * * *
>
> It is perfectly apparent in the light of the history of the statute and its wording that the present action is one to recover specific money, impounded by statute

> in the hands of state officers, alleged to have been illegally exacted, and which has not been commingled with the funds of the state and to which the state does not assert title other than as limited by the provisions of the suspense statute.

The suspense statute in Texas was substantially the same as that of Utah. §80-11-13, Utah Code 1943.

The opinion of the court by Mr. Justice Harlan in *Tindal v. Wesley*, 167 U. S. 204, 221, 17 S. Ct. 770, 42 L. ed. 137, is an exhaustive discussion of principles which in our opinion should rule the suits at bar. The court held:

> * * * If a suit against officers of a state to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the state, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the state. Any other view leads to this result: That if a state, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision, declaring that no state shall deprive any person of property without due process of law (Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 236, 241 (41 : 979), the citizen is remediless so long as the state, by its agents, chooses to hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated. * * *
>
> We are of opinion that this suit is not one against the state within the meaning of the 11th Amendment.

The Utah statute proceeds as upon the theory of a suit against the taxing officer, here the state Tax Commission, for property illegally appropriated, providing by §80-11-13 that taxes paid under protest—

> * * * shall not be covered into the general fund, but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.

thus withholding from the state and setting aside the amount of the tax paid, to bide the outcome of the litigation of the several claims to that fund. And were these suits actions against the state itself to recover such fund, the Utah legislature has provided by §104-3-27, Utah Code Annotated 1943, that—

> * * * the consent of the state of Utah is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of this state or of the United States for the recovery of any property real or personal or for the possession thereof * * *

The Supreme Court of the State of Utah discussed this question in *State v. District Court of Salt Lake County*, 102

Utah 284, 115 P. (2d) 913, opinion on rehearing 102 Utah 290, 128 P. (2d) 471. That suit was one against the State of Utah, as distinguished from the State Tax Commission, to recover taxes paid under protest under an unconstitutional statute. The question was how service could be obtained *on* the State, whether the summons served upon the Governor and the Attorney General was sufficient to give the District Court jurisdiction over the State of Utah as defendant. The court first held that while it was evident that by §80-11-11 the State of Utah had consented to be sued, the law provided no method whereby service could be had on the State, this in contrast to the procedure in actions against the tax collecting officer, or State Tax Commission, the manner of service upon which was expressly provided. In his concurring opinion, Mr. Justice Larson said:

> * * * the statute requiring that taxes collected by state officers or boards, and paid under protest, be not covered into the state funds, but are sequestered and retained by the Treasurer as separate moneys in his hands pending determination as to whether it belongs to the state or to the taxpayer. The state not having received the money is not subject to suit for repayment thereof. Such action must lie against the person who received or who has the possession and control of the property. Pending determination as to whom the money belongs, the state has no more claim to or control over the money than the taxpayer. The action, therefore, should lie against the party who has the money. *Such party is not the state under the provisions of the statute.* (Italics supplied.)

Upon rehearing the majority held that by analogy service of the summons upon the Governor and the Attorney General was sufficient. In the then concurring opinion of Judge Leverich, it is said:

> Section 80-11-11, Revised Statutes of Utah 1933, provides that the party bringing the action may sue the state, county or municipality, or he may bring the action against the officer to whom the tax was paid. In the former opinion in this case it was concluded that Section 80-11-13 modified Section 80-11-11, to the extent that when action is brought to recover taxes paid to the state, the tax collecting officer of the state and not the state must be the party against whom the action is brought. This interpretation is not justified by the language contained in Section 80-11-13. To reach that conclusion would require reading into this section (80-11-13) much that is not there. This should be done by the legislature and not by the court.

The statute speaks in the alternative: the taxpayer may sue *either* the state *or* the collecting officer, here the State Tax Commission. For purposes of suit the State and the collecting officer are individual and separate entities. As expressed by Mr. Justice Harlan in Thomas v. Ohio State University Trustees, supra, as the Commission "was entitled to sue and be sued by their collective name, and would be bound by any judgment rendered against it in that name, the jurisdiction of the circuit (district) court" sufficiently appeared by alleging the citizenship of each member of the Commission.

That the State of Utah has waived its immunity to suit in the federal courts, we submit, is clear, and that waiver, coupled with the federal question here present, establishes the jurisdiction of the courts below in the suits at bar; but we submit it is also clear that the Utah legislature had no intention of confining the jurisdiction of the federal courts, in suits under these statutes, to those suits only wherein a federal question shall be present. The general and unquali-

fied consent, waiver and authority here appearing, manifest a legislative intent to permit access to the federal and state courts indiscriminately, regardless of the existence of a federal question, to the end that otherwise qualified litigants shall have available to them, as they have had in the past, unobstructed recourse to the federal courts. The collecting officer, who by the very statute itself is constituted an entity separate and apart from the state for purpose of suit in any court of competent jurisdiction, is capable of acquiring citizenship for purpose of federal jurisdiction.

III
Point

The court below plainly misconstrued Utah law in holding that the present actions could not be maintained against the individual commissioners.

The majority of the court below has held, not only that these suits cannot be maintained in the Federal court against the collecting officer, the State Tax Commission, because the Commission for this purpose in its opinion was the State of Utah, but also that they cannot be maintained in the Federal court against the individual defendants, who are charged with unlawful and unauthorized exaction of funds. We believe that in this respect, too, the majority erred, since the rule in Utah is plainly to the contrary.[3]

The complaints name the individual members of the Commission as defendants. (R. 1, 116) Yet the majority below reasoned that the impact of a judgment against them would be felt by the State; that consequently the State was

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[3] The dissenting judge, having concluded that plaintiffs were entitled to recover upon the basis urged in Point I, *supra*, did not discuss this point in his opinion.

the real party in interest; and that consequently plaintiffs stood no better in this aspect of the case than they did as respects the suit against the State itself.

The Utah courts, on the contrary, distinguish between a suit against a state commission, and a suit against individuals who constitute such a commission. In *State, by State Road Commission, et al., v. District Court, Fourth Judicial District,* 94 Utah 384 78 P. (2d) 502 (1938), the Supreme Court of Utah held that a suit, insofar as it was brought against the Road Commission, an agency of the State, was against the State itself and that the State had not given its consent.[4] It then considered the possibility of obtaining relief against the *individual members* of the Road Commission, though recognizing (94 Utah at 390, 78 P. (2d) at 505) that the effect of relief against the individuals "will be to coerce the State into paying * * * damages, or permanently prevent the State from carrying out the proposed highway improvement." The court posed the question (94 Utah at 392, 78 P. (2d) at 506): "Can the members of the Road Commission, if sued as individuals, avoid the injunction by asserting that they are acting as an agency of the State and the State cannot be sued?" It concluded that the suit against the individual members was an entirely different matter. "It must not be said that any officer of the State is not amenable to the process of the courts for violation of the law. The

[4] The State Road Commission may be sued only on written contracts made by it and may settle only those claims arising out of its negligence that are not in excess of $250.00. Utah Code Ann. 1943, §36-2-1. It is not an autonomous body; it is but one of the agencies of the state operating under the authority of the engineering commission. Utah Code Ann. 1943, §82C-1-2 and 12.

immunity of the State from suit cannot be successfully invoked by any official, high or low, to prevent the courts from enjoining an act forbidden by law." (94 Utah at 405, 78 P. (2d) at 511) The same doctrine has found frequent recognition in this and other Federal courts. *Worcester Transit Co. v. Riley*, 302 *U. S.* 292; *Greene v. Louisville & I. R. R. Co.*, 244 U. S. 499; *Atchison T. & S. F. Ry. Co. v. O'Connor*, 223 U. S. 280; *Hopkins v. Clemson Agricultural College*, 221 F. S. 636; *Ex parte Young*, 209 *U. S.* 123; *Poindexter v. Greenhow*, 114 U. S. 270; *State Board of Escheats of Michigan v. Klump*, 38 F. (2d) 625 (C.C.A. 6th); *State Life Ins. Co. v. Daniel*, 6 F. Supp. 1015 (D. C. W. D. Tex.).

The majority below appear to have been misled by an erroneous interpretation of both the Utah statutes and the complaints themselves. As to the statutes, the opinion (see R. 160-161) seems to rest its conclusion that the State of Utah is the real party defendant upon a belief that if suit were successfully maintained against the individuals, the State would nevertheless be required to pay the amount of the judgment under Section 80-11-13 of the Code. That is a plain misinterpretation of that section: the State has no responsibility for the reimbursement of the defendants if they are held individually liable. Section 80-11-13[5] simply

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[5] The Section reads:

In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund, but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was

provides for the segregation of funds paid under protest, so that if the State be sued, as it may be under Section 80-11-11, such funds may, if necessary, be promptly repaid. There is no authority whatever in Section 80-11-13 for payment of a judgment obtained against an individual in a suit which is not bottomed on the statutory procedure outlined in Section 80-11-11.*

The misinterpretation of the complaints is, we submit, equally apparent. The majority opinion states (R. 143) that petitioners must have intended to sue the State, since their complaints allege that the funds were paid under protest, and that the payments had not been covered into the general funds of the State, but were being retained as required by law. The opinion then added: (R. 143)

> If these were suits against the individual members of the Commission for a personal judgment, these allegations would be surplusage and immaterial to the issue.

That conclusion is wholly unwarranted. Petitioners had every reason to believe, and still believe, that a suit against the State Tax Commission, the first-named defendant, would

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unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.

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* That the legislature of the State of Utah might *later* determine, as a matter of legislative policy, to reimburse the individuals who were thus held liable, of course, does not make the action a suit against the State.

be within the jurisdiction of the Federal courts, and the allegations relating to Sections 80-11-11 and 80-11-13 were highly relevant as against that defendant. On the other hand, the petitioners had also every reason to believe that they could add a second string to their bow by suing the individuals, under the *State Road Commission* case, *supra*. The complaint was simply drawn to comply with all of its requirements for suit against all of the parties defendant. The District Court, in fact, entered judgments against all parties (R. 26, 137)—though, of course, petitioners would not have been entitled to more than one satisfaction of their judgments.

Consideration of the complaints illustrate further their dual nature. Although were the action to be construed as one against the State of Utah, jurisdiction was well founded on the existence of a federal question; as against each the State Tax Commission and the individual defendants, the complaints added a second line of jurisdiction—irrelevant to suits against the State—namely, diversity of citizenship. (R. 1, 116) Again, it is beyond dispute that the State Tax Commission may be sued without joining the individual members; indeed, that is the customary form of such a complaint. See, *e. g., Peterson v. State Tax Commission*, 106 Utah 337, 148 P. (2d) 340; *Ford J. Twaits Co. v. State Tax Commission*, 106 Utah 343, 148 P. (2d) 343; *Intermountain Title Guaranty Co. v. State Tax Commission*, ... Utah ....., 152 P. (2d) 724; *W. M. & M. S. Browning Co. v. State Tax Commission*, ... Utah ....., 154 P. (2d) 993. Had no relief been sought against them as individuals in the instant cases, the usual form would have been used. Finally, it should be noted that the complaints allege (R. 10, 124),

that "said seizure by said defendants was, and is, wholly without authority from the State of Utah or otherwise or at all, wholly in excess of the power of said defendants, or any of them * * *."

We submit, therefore, that the decision below was also in error in refusing the jurisdiction based upon the individual liability of the respondents—a liability which is clearly imposed by Utah law.

CONCLUSION

Wherefore, we submit that the decision below should be reversed, and the causes remanded to the court below with directions to hear and dispose of them on the merits.

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APPENDIX

Utah Code Annotated 1943:

80-5-66.

* * * every person engaged in the business of mining or producing ore containing gold, silver, copper lead, iron, zinc or other valuable metal in this state shall pay to the state of Utah an occupation tax equal to one per cent of the gross amount received for or the gross value of metalliferous ore sold which tax shall be in addition to all other taxes provided by law. * * *

The basis for computing the occupation tax imposed by this act for any year shall be as follows:

(a) If the ore or metals extracted is sold under a bona fide contract of sale the amount of money or its equivalent actually received by the owner, lessee, contractor or other person operating the mine or mining claim from the sale of all ores or metals during the calendar year * * *

80-5-81.

All occupation taxes imposed and collected under this act shall be paid to the state tax commission, and by it promptly paid over to the state treasurer, and by him credited to the state general fund.

80-5-76.

No court of this state except the supreme court shall have jurisdiction to review, alter, or annul any decision of the tax commission or to suspend or delay the operation or execution thereof: *provided*, any taxpayer may pay his occupation tax under protest and thereafter bring an action in any court of competent jurisdiction for the return thereof as provided by section 80-11-11, Revised Statutes of Utah, 1933.

80-11-11.

In all cases of levy of taxes, licenses, or other demands for public revenue which is deemed unlawful by the party whose property is thus taxed, or from whom such tax or license is demanded or enforced, such party may pay under protest such tax or license or any part thereof deemed unlawful, to the officers designated and authorized by law to collect the same, and thereupon the party so paying or his legal representative may bring an action in any court of competent jurisdiction against the officer to whom said tax or license was paid, or against the state, county, municipality or other taxing unit on whose behalf the same was collected, to recover said tax or license or any portion thereof paid under protest.

80-11-13.

In case any tax or license shall be paid to the state under protest, said tax or license so paid shall not be covered into the general fund but shall be held and retained by the state treasurer and shall not be expended until the time for the filing of an action for the recovery of said tax or license shall have expired, and in case an action has been filed, until it shall have been finally determined that said tax or license was lawfully or was unlawfully collected. If in any such action it shall be finally determined that said tax or license was unlawfully collected, the officer collecting said tax or license shall forthwith approve a claim for the amount of said tax or license adjudged to have been unlawfully collected, together with costs and interest as provided by law, and any excess amount in excess of said tax required to pay said claim, including interest and costs, shall be repaid out of any unappropriated funds in the hands of the state treasurer, or, in case it is necessary, a deficit for said amount shall be authorized.